

ALYESKA PIPELINE SERVICE CO.  
STATE OF ALASKA

IBLA 90-211, 90-301

Decided August 26, 1993

Appeals from a decision of the Alaska State Office, Bureau of Land Management, approving a Native allotment application and rejecting two highway rights-of-way to the extent they conflicted with the allotment application. F-12971, F-21630, F-37579.

Set aside and remanded for contest.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

When a Native allotment applicant amends the land description of her allotment application to move the location of the land sought, she has the burden of establishing that the amended description correctly describes the land that she originally intended to claim. BLM may not approve such an amendment without giving notice of the amendment to parties. BLM also may not approve such an amendment without requiring the applicant to demonstrate that the land in the amended description was the land she originally claimed based upon her use and occupancy of it that was potentially exclusive of others.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, State of Alaska, for the State of Alaska; Thomas E. Meacham, Esq., Anchorage, Alaska, for Alyeska Pipeline Service Company; Kathy J. Keck, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Maureen T. Lewis.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Alyeska Pipeline Service Co. (Alyeska) and the State of Alaska have appealed from a January 5, 1990, decision of the Alaska State Office, Bureau of Land Management, Branch of Doyon Adjudication (BLM), approving Native allotment application F-12971 filed by Maureen T. Lewis. The January 1990 decision found highway rights-of-way F-21630 and F-37579 null and void in part, as to portions thereof in conflict with the Lewis allotment. For administrative convenience, the appeals by Alyeska and the State are consolidated for decision because they involve the same issues and land.

On June 9, 1970, Lewis filed Native allotment application F-12971 with the BLM office in Fairbanks. She applied for approximately 160 acres of unsurveyed land which she described as:

Land located mile 72 Elliott Hiway[.] Section 30 township T 8 north Range 5 W Meridian Fairbanks[.] From West Fork Bridge, U.S. Survey No. - 4441 Lot #1 proceeding toward Livengood, the distance of 1 6/10 miles Corner post & marker located on upper side of road. Then 1/2 mile, further on Road Frontage[.] Corner post located on upper side of road. The Road name Elliott Highway. Mile 72[.] [Emphasis in original.]

At section 5, the "remarks" section of her application, following a handwritten statement that "We are going to raise garden truck also some pigs and chickens" the following typed land description appears:

Beginning at a point on the centerline of Elliott Highway 22 chains southwest of the crossing of Rosebud Creek, thence N. 30 degrees W. 40 chains to corner 2, thence N. 60 degrees E. 40 chains to corner 3, thence S. 30 degrees E. 40 chains to corner 4, thence S. 60 degrees W. 40 chains to the point of beginning. Contains 160 acres. Located in section 30, T. 8 N., R. 5 W., F.M.

BLM determined from the information supplied by Lewis that the land she applied for was in secs. 19 and 30, T. 8 N., R. 5 W., Fairbanks Meridian. On the June 12, 1970, master title plat (MTP), BLM depicted F-12971 as a square tilted at an angle of about 45 degrees to the protracted section lines of secs. 19 and 30. The southern corner of the allotment ended at about the midpoint of sec. 30 while its northernmost corner invaded the south half of sec. 19. An existing road, the Livengood-Eureka Highway (Old Elliott Highway) is shown running roughly parallel to and inside the southeastern side of the allotment. On the sketch-map submitted with her application, however, Lewis had shown that the southeasterly perimeter of her claim conformed to a northerly-trending bend (called a "dog-leg" in the Alyeska statement of reasons (SOR)) in the Old Elliott Highway and indicated that the highway remained south of, and outside the allotment.

Lewis stated in her 1970 application that she had constructed improvements on and occupied the land she claimed since May 25, 1968, and that she also used it for hunting, trapping, and berry picking. In an affidavit filed with BLM on August 27, 1975, however, she explained that she began using the land in 1963, but had reported 1968 as the year she initiated use on her allotment application because that was the year she moved onto the land and built a house there.

On October 24, 1970, Lewis granted to various oil companies (for which Alyeska acted as agent) a 200-foot-wide right-of-way within her allotment. Alyeska states in its SOR at page 10 that this right-of-way was "to accommodate the possible location of the Dalton Highway which had yet to be surveyed or built" (Alyeska Exh. 16; see also State SOR at 6). Between 1969 and 1971, Alyeska, on behalf of the owner companies of the trans-Alaska oil

pipeline, constructed the Dalton Highway (also known as TAPS, or Trans-Alaska Pipeline System Road). This highway was subsequently transferred to the State as a public highway, and serialized by BLM as F-21630. As-built survey maps of the highway were filed with BLM on January 15, 1973. The Dalton Highway parallels Alyeska's trans-Alaska pipeline the entire length of the highway and is the only overland link to the Prudhoe Bay oil fields (see Alyeska SOR at 3-4). The Dalton Highway was constructed to the south of Lewis' original allotment. However, as discussed below, the amended Lewis allotment does cover a portion of the Dalton Highway. Both Alyeska and the State claim interests in the highway which are affected by the amended Lewis allotment (see Alyeska SOR at 4, State SOR at 3).

On August 31, 1979, BLM granted right-of-way F-37579 for a realignment of the Elliott Highway. The grant was made pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), subject to valid existing rights. A land report accepted on August 21, 1979, for this grant states at page 9: "At the end of the project is a Native allotment (F-12971, Maureen Lewis) that is located just to the north. The existing highway goes through the allotment; the proposed alignment does not. Access would be provided from the new highway." In reliance on the BLM grant, the "new" Elliott Highway was constructed in 1980-81 (see State SOR at 1-2).

In 1983 Lewis substantially amended the land description of her Native allotment application. <sup>1/</sup> A supplemental Native allotment field report dated June 24, 1983, describes the allotment as embracing land in secs. 29 and 30 rather than secs. 19 and 30, T. 8 N., R. 5 W., Fairbanks Meridian. The report, prepared by a BLM natural resource specialist, states that the "modifications" were made "to fit applicant's intentions, use, and current policies and practices for survey instructions." Id. at paragraph A.1. The report explains:

Survey instructions in this report were developed after discussion with applicant and her husband, examination of her on the ground posted boundaries, consideration of her applied-for description and her original intentions, and recommended procedure for survey instructions. Understanding of correct location and suitable survey description was reached by this examiner, applicant Maureen and her husband Ray Lewis.

Id. at paragraph D.

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<sup>1/</sup> The survey instructions provided in the report (paragraph E.) establish a point of beginning and corner 1 at the center of the intersection of the Old Elliott Highway, New Elliott Highway, and the Dalton Highway. Corner 2 was established by proceeding 20 chains in a northwesterly direction on the centerline of the Dalton highway. Corner 3 was 30 chains due north of corner 2. Corner 4 was established at a point 60 chains easterly of corner 3. From Corner 4 the survey would proceed southerly approximately 10 chains to corner 5 established on the centerline of the New Elliott Highway. Proceeding from Corner 5 in a southwesterly direction for 50 chains would close the description on corner 1.

On July 5, 1983, Lewis and her husband certified that the amended description covered the land she originally intended to claim as her allotment. A sketch included in the report shows the configuration of the amended allotment then claimed to be in a truncated triangular shape with three corners on the rights-of-way centerlines of the two highways with the tip of the triangle protruding into sec. 29. The MTP for July 13, 1983, shows a slightly different configuration, with the New Elliott Highway passing through the Lewis allotment inside corner 5, and the Dalton Highway bordering the perimeter from corner 1 to corner 2. The MTP dated February 27, 1984, reflects yet another change, showing that the allotment's corners 5, 2, and 1 are all outside the rights-of-way centerlines. U.S. Survey 8610 of the Lewis allotment was run from June 5 through June 13, 1987, and accepted September 23, 1988, and marks the final configuration. The MTP for October 6, 1988, depicting USS 8610, shows corners 5, 2, and 1 of the Lewis allotment on the centerlines of the rights-of-way.

On January 26, 1987, BLM notified the State and Alyeska that the land description for Native allotment F-12971 had been changed from secs. 19 and 30 to secs. 29 and 30, T. 8 N., R. 5 W., Fairbanks Meridian. The notice did not, however, include the amended description of the allotment application. Alyeska and the State were allowed 60 days in which to protest the amended location. On April 7, 1987, the State filed a protest asserting that the allotment conflicted with the "200 foot right-of-way of the reconstructed Elliott Highway (F-37579), and the 200 foot right-of-way of the Dalton Highway (F-21630) along the south side of the allotment." In the January 1990 decision now before us on appeal, BLM dismissed this protest as untimely filed and found, citing State of Alaska, Golden Valley Electric Association, 110 IBLA 224 (1989), that:

The Dalton Highway, serialized as F-21630, and the reconstructed portion of the Elliott Highway, serialized as F-37579, were constructed after Maureen Teresa Lewis's claimed use and occupancy in 1963. The centerlines of both highways were used as corner locations for the survey of her allotment, and the survey follows the centerline of the Dalton Highway from its intersection of the Elliott Highway, northwesterly for 25.89 chains. Because these grants are subject to valid existing rights, the Native allotment takes precedence over these rights-of-way. The rights-of-way are hereby declared null and void as to the portion within Native allotment F-12971 and will not be reserved in the certificate of allotment, when issued.

The State challenges the factual predicate for this finding, contending that the rights-of-way are valid existing rights to which the Native allotment must be made subject. The State asserts that the conflicts between the Lewis allotment and the rights-of-way were created by the 1983 amendment of the allotment land description, which is without foundation in fact, and that BLM failed to undertake "some credible analysis \* \* \* whether there had been qualifying use and occupancy by Ms. Lewis of the areas in conflict" (SOR at 5). Alyeska also challenges the BLM finding on factual grounds, taking the position that the Native allotment was improperly amended to the

detriment of right-of-way F-21630. Alyeska asserts that "[it] is apparent from the BLM file \* \* \* that Lewis in 1983 extended her claim southward to include land which had been made valuable by its proximity to two major highways which did not exist when her occupancy began in 1963" (Alyeska SOR at 14, emphasis in original). Both the State and Alyeska assert that BLM failed to analyze critical factual conflicts prior to partially cancelling the rights-of-way to the extent they conflicted with the allotment. They request that the matter be remanded for a contest proceeding. Lewis has answered that her allotment was properly amended and argues that BLM's decision should be affirmed.

[1] Section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1988), provides that a Native allotment applicant "may amend" the land description in her application if the amendment accurately describes the land which the applicant "intended to claim at the time of the application." The statute does not, however, allow an applicant to add land to that originally described. Mitchell Allen, 117 IBLA 330, 337 (1991), and cases cited. If an applicant is permitted to amend her application, section 905(c) of ANILCA further requires the Secretary, before adjudicating or recognizing legislative approval of the application, to notify the State of the "intended correction of the allotment's location," whereupon the State may protest "as provided in subsection (a)(5) of this section." Section 905(c) of ANILCA also provides that, where notice of the intended amendment of the land description in an allotment application is provided after the 180-day period following December 2, 1980, the State shall have 60 days following the mailing of such notice to file a protest, "which protest, if timely, shall be deemed filed within one hundred and eighty days of December 2, 1980, notwithstanding the actual date of filing." 43 U.S.C. § 1634(c) (1988).

A threshold issue presented by the State's appeal therefore concerns the sufficiency of BLM's 1987 notice to the State of allotment amendment. We find that BLM's January 25, 1987, notice was insufficient because it failed to include a description of the allotment as amended, and consequently failed to provide notice of the existence of a conflict between the rights-of-way and the Lewis allotment. Under section 905(c) of ANILCA, proper notice to the State is a prerequisite to either adjudicating or recognizing the legislative approval of an allotment. Consequently, BLM's failure to provide adequate notice of the amendment to appellants, in and of itself, invalidated the subsequent adjudication of the Lewis allotment application, F-12971.

Nor did the purported adjudication of the Lewis application resolve the question whether amendment of her land description was properly made. The legislative history of section 905(c) of ANILCA indicates that such amendments were intended to address errors that were "subject to correction under authority of Section 905(c)" to include "[t]echnical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams." S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Admin. News

5070, 5230. Clearly, section 905(c) of ANILCA was designed to permit, subsequent to December 18, 1971, the amendment of a Native allotment application so that it accurately described land misdescribed by the original application, and not to permit the substitution of new or additional land not included in the original claim. See State of Alaska, 119 IBLA 260, 266 (1991) and cases cited therein.

In the instant case, comparison of relevant MTP's before and after amendment of the Lewis application in relation to the original and amended applications leaves little doubt that "new" or "additional" land was substituted in the 1983 amendment of her allotment description. Under the circumstances described by the record in this case, it was therefore necessary that BLM require Lewis to establish that the land described in the amended application was really the land she had used and occupied since 1963 and had, as a consequence of such use and occupancy, "intended to claim." 43 U.S.C. § 1634(c) (1988). Cf. Naknek Electric Association, Inc., 126 IBLA 256, 258, 259 (1993) (a Native allotment applicant's use and occupancy could not be shown to be "at least potentially exclusive of others" as required by Departmental regulation, so as to exclude an electrical transmission line that was in continuous operation across the claimed allotment for four years before his occupancy began).

The question whether there was use and occupancy potentially exclusive of others by Lewis of the land added to her application in her 1983 amendment is a question of fact that is not resolved on the record before us. The appellants have pointed to circumstances indicating it is unlikely Lewis could have any factual foundation upon which to claim the land added by her amendment of her 1970 allotment application. Lewis has presented no evidence on the question of her use and occupancy of the land added by the amendment, nor has BLM made a finding on the question. On remand, BLM will initiate a contest of her amended application to determine whether she can prove, with respect to the amended land description only, that her application was properly amended to include land in conflict with rights-of-way F-37579 and F-21630.

We find, therefore, that qualifying use and occupancy of those lands added to the Lewis application by amendment in 1983 must be established in conformity to requirements established by Departmental regulation 43 CFR 2561.0-5(a). The conclusion in the January 1990 decision that Lewis had "satisfied the use and occupancy requirements" for the land in the amended application is not supported by the record before us, and the question raised must therefore be determined in a contest. State of Alaska, 117 IBLA 148, 151 (1990). The required contest will fulfill the requirement imposed by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) that a native allotment claimant be provided a hearing before the Department in cases where denial of a claim is a possibility. See State of Alaska, 119 IBLA 260, 271 (1991). The contest is to be limited to the amended land description only. See 43 U.S.C. § 1634(c) (1988).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 5, 1990, decision is set aside and the cases are remanded for initiation of a contest proceeding.

Franklin D. Arness

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Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge